Marbro Company, Inc., and its alter ego and/or successor, R. Marinucci & Sons, Inc. *and* Local 77, International Union of Operating Engineers, AFL–CIO. Case 5–CA–12572

April 21, 1993

SECOND SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On April 13, 1992, Administrative Law Judge Michael O. Miller issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief,[1] and the General Counsel filed cross-exceptions and a supporting brief. Both the Respondent and the General Counsel filed answering briefs to the other party's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified herein and to adopt the recommended Order as modified.

1. Based on his reading of the Board's original decision reported at 284 NLRB 1303 (1987), the judge found that the Respondent had lawfully withdrawn recognition from the Union and, accordingly, its bargaining obligation ceased at that time. For this reason, the judge found no reason to extend the Respondent's liability beyond $57,664.04, the backpay amount determined due by the Board on December 22, 1989, and subsequently enforced by the United States Court of Appeals for the Fourth Circuit on November 29, 1990. The General Counsel excepts to the judge's finding restricting liability and urges us to order the Respondent to fully comply with the remedy fashioned by the Board in 1987. In this regard, the General Counsel asserts that more backpay may be due in the case of three former Marbro strikers who continued their employment with R. Marinucci & Sons, Inc.

We find merit in the General Counsel's exceptions. The judge misread footnote 3 of the Board's 1987 decision and the corresponding pertinent parts of Administrative Law Judge Benard's underlying decision. Contrary to the judge's findings here, Judge Benard's dismissal of the 8(a)(5) allegation, which the Board adopted in the absence of exceptions, was based on her finding that Marbro Company, Inc. had actually met its bargaining obligation for a separate agreement with the Union. Thus, neither Judge Benard nor the Board made any finding that union recognition had been withdrawn lawfully or otherwise. Accordingly, we shall specifically modify the judge's Order to require full compliance with the Board's 1987 decision, including the posting of the notice to employees and the payment of benefit fund contributions for any returned striker for periods when they may have been carried on the payroll of R. Marinucci & Sons, Inc.

2. In adopting the judge's conclusion that R. Marinucci & Sons, Inc. (RMS) is the alter ego of Marbro Company (Marbro), we find *Alkire v. NLRB*, 716 F.2d 1014 (4th Cir. 1983), denying enf. 259 NLRB 1323 (1982), factually distinguishable from the situation presented here. In *Alkire*, the court refused to hold the old company (Alkire) responsible for the unfair labor practices committed by the new company (Mountaineer) because, even assuming that Alkire and Mountaineer may have been controlled by the same entity or individual, there was insufficient evidence that an expected or reasonably foreseeable benefit from the transfer of the business was related to the elimination of Alkire's labor obligations.

Here, in contrast, the judge found, and the record supports his finding, that John Dowd and Rosario Marinucci have possessed significant control over both Marbro and RMS at all relevant times. Dowd had an intimate role in Marbro's affairs before he became president of RMS and there is no indication whatsoever that Marinucci exercised any day-to-day management while Dowd served as Marbro's president. Then, after his wife died, Marinucci became the major investor in RMS and acted as its principal loan guarantor. Dowd's testimony reveals that Marinucci was not a silent money giver but was instrumental in having RMS agree to serve as a subcontractor and complete several unfinished projects of Marbro, representing something in the range of $150,000 and $180,000, in order to retain Marinucci's good reputation in the community. In addition, the emergence of RMS, unlike the transfer to Mountaineer in *Alkire*, also brought about an important reasonably foreseeable potential economic benefit to the owner of the old company as noted by the judge. Thus, absent a finding of alter ego, with the formation of RMS, the Marinucci family could stay in the sewer and utility construction business but not have their future projects saddled with the obligation to pay any union benefit fund contributions on behalf of returning

[1] The Respondent has requested oral argument. This request is denied as the record, the exceptions, and the briefs adequately present the positions of the parties.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

strikers in accordance with the Board's Order issued on July 24, 1987.[3]

We also adopt the judge's conclusion that RMS is a *Golden State* successor to Marbro and, thus, liable additionally under that theory to remedy the unfair labor practices previously committed by Marbro.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Marbro Company, Inc. and R. Marinucci & Sons, Inc., Beltsville, Maryland, its officers, agents, successors, and assigns, shall take the action set forth in the Order and pay $57,644.04[4] to the appropriate union benefit funds.

IT IS FURTHER ORDERED that the Respondent shall fully comply with the Board's July 24, 1987 Order. In particular, the Respondent is responsible for benefit fund payments for any returned strikers for periods when they may have been carried on either Marbro's or RMS's payrolls until the Respondent negotiates in good faith with the Union to an agreement or to a good-faith impasse or until the Union refuses to bargain. The Respondent is also required to post the notice to employees set forth in the Board's original decision reported at 284 NLRB 1303 (1987), but with both Marbro Company, Inc. and R. Marinucci & Sons, Inc. listed as the named employer.

[3] In adopting the judge's alter ego findings, we reject the Respondent's contention that the judge's statement that Marbro Company ''experienced a *bona fide* discontinuance'' is necessarily inconsistent with an alter ego finding. The judge was merely stating in different terms what he had stated in the previous sentence—that there were reasons for the discontinuance other than a desire to discontinue satisfying its ''labor relations obligations.''

[4] Because the provisions of employee benefit funds are variable and complex, we will leave to further compliance proceedings the question of whether the Respondent must pay any additional amounts into the benefit funds in order to satisfy our Order. Depending on the circumstances of each case, these additional amounts may be determined by reference to provisions in the documents governing the fund at issue and where there are no governing provisions, by evidence of any losses directly attributable to the unlawful withholding, which might include the loss of return on investment of the portion of the fund withheld, additional administrative, costs, etc., but not collateral losses. See *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

Angela S. Anderson, Esq., for the General Counsel.
John William Mannix, Esq., for the Respondent.
Robert P. Horst, Business Representative, for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge. This matter was heard in Rosslyn, Virginia, on September 19 and 20, 1991, and January 13 and 14, 1992, based on a compliance specification and notice of hearing which was issued by the Regional Director for Region 5 of the National Labor Relations Board (the Board), on December 21, 1990, and an answer to the specification which was timely filed on January 22, 1991, on behalf of R. Marinucci & Sons. Inc. (RMS). No answer was filed and no appearance was entered on behalf of Marbro Company, Inc. (Marbro).

The specification alleged, and RMS' answer denied, that RMS is the alter ego of, or the successor to, Marbro and, as such, is liable to remedy unfair labor practices which Marbro was previously found to have committed.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent RMS, I make the following

I. FINDINGS OF FACT

A. *Background*

The original charge in this matter was filed on September 5, 1980, and resulted in the issuance of a complaint on October 22 of that year. The complaint alleged that Marbro had violated Section 8(a)(5) and (1) of the National Labor Relations Act by its untimely withdrawal from an multiemployer bargaining association, refusing to honor and abide by the terms of an agreement negotiated by that association and Local 77, International Union of Operating Engineers, AFL–CIO (the Union or Charging Party), withdrawing recognition from the Union, and unilaterally discontinuing payments to that Union's fringe benefit trust funds on behalf of its employees.

The administrative law judge's decision issued on June 18, 1982. On July 24, 1987, the Board issued its Decision and Order, adopting the administrative law judge's decision to the extent that she had found that Marbro's unilateral discontinuance of fringe benefit fund contributions on behalf of returning strikers violated Section 8(a)(5) and (1).[1] Marbro was ordered to make those employees whole by the payment to them of any losses resulting from the unilateral change and the payment of appropriate contributions to the fringe benefit funds on their behalf, continuing the contributions until Marbro negotiated with the Union in good faith to an agreement or impasse or a refusal to bargain by the Union.

Enforcement of the Board's Decision and Order was granted, without Marbro's answer or opposition, by the Fourth Circuit Court of Appeals on April 28, 1988.[2]

Following enforcement, a compliance specification and notice of hearing issued, alleging that Marbro had failed to pay a total of $57,664.04 to the Union's pension, health & welfare and Apprenticeship funds on behalf of 13 named employees. Marbro filed no answer, the undenied allegations of the specification were deemed to be true, and the Board, on December 22, 1989, issued its Order, directing Marbro, its officers, agents, successors, and assigns to make those payments, ''plus any additional amounts computed in the manner described in *Merryweather Optical Co.*, 240 NLRB 1213 fn. 7 (1979), accrued to the date of payment.''[3] That Supplemental Decision and Order was enforced by the Fourth Cir-

[1] 284 NLRB 1303 (1987).
[2] No. 87-3663, unpublished.
[3] 297 NLRB No. 69 (Dec. 22, 1989) (unpublished).

cuit Court of Appeals on November 29, 1990, without Marbro's opposition.

Marbro having ceased to function as a going concern (discussed in greater detail, infra), the General Counsel issued this second compliance specification alleging that RMS was the alter ego of, or successor to, Marbro and should therefore be required to comply with the affirmative remedy provisions of the Board's Orders, as enforced.

B. *Demise of Marbro and Birth of R. Marinucci & Sons, Inc.*

Marbro was a Maryland corporation wholly owned by Rosario Marinucci, its president. His wife, Ida, was Marbro's secretary-treasurer. In the last few years of its operations, at least, his sons, Steven and Michael, were corporate directors; one son-in-law, John Dowd, was the comptroller. His sons and sons-in-law (the above and Joseph Farrell) also occupied supervisory positions within the firm; however, they held no ownership interests.

In addition to Marbro, Rosario Marinucci was the sole owner of several other corporations or enterprises which leased trucks, equipment, and real property to Marbro.

In its inception, Marbro was primarily engaged in sewer construction. Much of this work was performed in the Washington metropolitan area for the Washington Suburban Sanitary Commission (WSSC). Its sewer work included major utility jobs, including the laying of large (up to 108-inch diameter) pipe under multimillion dollar contracts. In about 1978, with its principal business declining, Marbro began to expand into other areas of heavy construction, including bridge building, tunneling, and road and airport runway construction. Some of this work was outside of the Washington metropolitan area, including sites in West Virginia and Georgia. By early 1985, Marbro had increased its work force to as many as 450–500 employees, including up to 75 heavy equipment operators.[4] Each of the Company's divisions, bridge, highway, tunneling, and utility work, had a separate vice president; these vice presidents were not family members and they owned no part of the Company.

Marbro, it appears, overextended itself with respect to these new endeavors. In particular, the recession in 1981–1982, and its bidding of large projects at 1981 prices which were then performed at the increased costs of subsequent years, created serious financial difficulties by 1983 and 1984. The banks began to foreclose on loans secured by Marbro's construction equipment, and it was completing its various projects with the forbearance of the lenders on cash infused by the bonding companies. It was, however, unable to secure new bonds necessary to take new work.

In the same period, around 1985, Ida Marinucci was diagnosed with a terminal illness. As a result, Rosario turned the operation of Marbro (and all of his other business organizations) over to John Dowd as president so that he could devote more attention to his wife. Steven replaced his mother as secretary-treasurer. Michael became vice president. Dowd's orders, it was testified, were to act at Rosario's direction, with the responsibility to wind the business down pursuant to the work out agreement with the banks and bonding companies. As projects were completed, the employees were terminated and the equipment sold. Approximately $4 million worth of construction equipment, 99 percent of what Marbro had owned, was sold.

In the summer of 1986, with Marbro jobs running down, the four sons and sons-in-law met with Rosario Marinucci to decide what direction the younger generation should take for their respective futures. Given the experience of three of them in the construction industry, and their family ties, it was decided that they would start a new company, to do sewer/utility work. Allegedly to honor the pater familias, they named the new enterprise R. Marinucci & Sons, Inc. It was incorporated in July 1986. Each of the four paid in an equal but nominal ($5000 or less) amount for 25 percent of the voting common stock. Rosario advanced them ''seed money,'' $250,000, for which he was issued nonvoting preferred stock. He also guaranteed a $1 million line of credit so that they could lease equipment.[5]

John Dowd became the president of RMS. Michael Marinucci and Steven Marinucci assumed the positions of vice president and secretary-treasurer, respectively. Rosario Marinucci did not become an officer. He was and is a director, however, along with the four sons and sons-in-law. According to Dowd's testimony, Rosario has no operational functions in RMS. He has never been called upon, as the guarantor, to meet any of RMS' financial obligations.

None of Marbro's vice presidents came over to RMS. They apparently left Marbro as their divisions completed whatever work they had.

There is no evidence that Marbro was ever formally dissolved. Counsel for Marbro contends that by not filing annual reports after fiscal 1987, Marbro dissolved by operation of law. Its last personal property return, filed with the State of Maryland on April 18, 1988, lists Dowd as president, Michael and Steven Marinucci as vice president and secretary-treasurer, respectively, and Michael and Rosario Marinucci and Cristina Farrell (his daughter and Joseph Farrell's wife) as directors.

When RMS began its operations, it leased its heavy equipment from an equipment supplier, with Rosario as guarantor. It acquired some small tools, equipment, and vehicles from Marbro, valued at about $150,000, and bought five dump trucks and trailers from Steven Rental, Marbro Trucking, or Rosario Marinucci.[6] Steven Rental and Marbro Trucking were concerns owned by Rosario which had leased those vehicles, and several others, to Marbro. These vehicles and trailers remain titled in the names of Steven Trucking and Rosario Marinucci; Dowd testified that they were never retitled. Steven Rental's drivers of three of those trucks became RMS employees. RMS also rented the office building and separate equipment yard which Rosario owned and had

[4] Marbro no longer recognized any unions as representing its employees and had no collective-bargaining agreements at this point in time.

[5] The record refers to a line of credit with the Maryland National Bank as well as a line of credit with the equipment supplier. It is not clear whether there were one or two lines of credit guaranteed by Rosario Marinucci.

[6] Dowd testified that RMS paid $20,000 to $35,000 each for these trucks and trailers. At another point in his testimony, he claimed that RMS rented them and then took over the payments. The record contains evidence that RMS paid Rosario Marinucci approximately $117,000 in a series of checks issued between mid-December 1986 and mid-March 1987; no one was asked, or explained, what obligations those checks satisfied.

rented to Marbro. There was no written lease; RMS allegedly paid Rosario $5000 per month for this property until 1988, when the rent increased to $10,000; the record contains no checks from RMS to Rosario or Marbro after March 1987.

As Marbro shut down, it subcontracted about six of its smaller projects to RMS; none exceeded $50,000. Steven Marinucci signed the subcontracting agreements for Marbro; Dowd signed for RMS.

During his tenure at Marbro, Steven Marinucci had served as pipe foreman of the utility crew. At RMS, he takes care of the shop and serves as field superintendent over one of the larger field projects. Dowd, who was Marbro's comptroller, is basically responsible for the office functions, including bidding, of RMS. Farrell, who had been a field superintendent for Marbro, retains that function at RMS. The record does not indicate the extent of Michael Marinucci's responsibilities for Marbro; he is a superintendent over excavation crews for RMS.

RMS works solely within the Washington metropolitan area, performing work for WSSC and private contractors. Because of its limited ability to secure bonds, most of its jobs are relatively small, in the range of $200,000 to $300,000 in value. It has had some jobs valued between $500,000 and nearly $2 million. For the most part, its projects involve the laying of small plastic pipe, 8 inches in diameter; occasionally, RMS lays storm drains up to 36 and 48 inches in size. It has not laid any 108-inch pipe because such jobs, if done for WSSC, require larger bonds than RMS can secure. RMS does not perform any bridge, highway, airport, or tunnel work.

Marbro had 78 on its payroll as of late September 1986 and about 50 in early January 1987, including managers and office employees. At that time, it had three or four sewer crews and it ceased to have any employees by February 1987. RMS had 18 field employees on its September 27, 1986 payroll and 58 total employees as of January 10, 1987. The three sewer crews which it initially employed were unchanged from their composition at Marbro. RMS currently employs about 61 workers, including 9 heavy equipment operators (3 crews of 3 operators each). At one point in the summer of 1990, its work force was up to 150. When it began to hire, most of its employees came from Marbro. According to Dowd, Marbro was laying off and thus was a logical source of employees whose qualities were known to RMS.

According to backhoe operator Leo Colaw, a Marbro employee since 1958, the employees were simply told that Marbro was going out of business and coming back as RMS. He was never told that he was terminated by Marbro and learned that he was on the RMS payroll from his paycheck. He and his son, who had a similar experience, suffered no hiatus in their employment. Neither did they see any reduction in pay or related fringe benefits. They continued to do the same work at the same sites. Virtually all of the RMS employees on the payroll in September 1986 and January 1987 were employees from the Marbro payroll. The majority of them were carried on both payrolls throughout that period. The foremen and superintendents on the RMS payroll for January 10, 1987, were virtually all former employees of Marbro; based on their rates of pay, it appears that most of them had occupied supervisory positions at Marbro, as Colaw testified.

II. ANALYSIS

A. *Contentions*

In *Perma Vinyl Corp.*, 164 NLRB 968, 969 (1967),[7] the Board held:

> To further the public interest involved in effectuating the policies of the Act and achieve the ''objectives of national labor policy, reflected in the established principles of federal law,'' we are persuaded that one who acquires and operates a business of an employer found guilty of unfair labor practices in basically unchanged form under circumstances which charge him with notice of unfair labor practice charges against his predecessor should be held responsible for remedying his predecessor's unlawful conduct.

It placed this responsibility on the ''bona fide purchaser'' of such a business as well as ''a successor or assign who operates as a disguised continuance of the old employer or to whom the business has been transferred as a means of avoiding liability under the Act.''

Similarly, in *Coast Delivery Service*, 198 NLRB 1026, 1027 (1972), the Board found the imposition of ''derivative liability'' in a supplemental proceeding, upon one who had not been a party to the original unfair labor practice proceeding, to be appropriate. What was required was that that party be ''sufficiently closely related to the party found to have committed the unfair labor practices.'' Such parties have been described by the Board and the courts as ''successor,'' ''single employer,'' and ''alter ego.''

Counsel for General Counsel argues that RMS is the alter ego of, or successor to, Marbro and should therefore be held responsible for remedying Marbro's unfair labor practices.

RMS does not contest the basic principles cited above but disputes their applicability to the instant situation. Specifically, RMS contends that it is neither a successor to nor alter ego of Marbro, that there is no evidence that RMS' creators knew of Marbro's unfair labor practices, and that a balancing of the interests weighs against a finding of successor liability.

B. *Alter Ego or Successorship*

The Board finds an alter ego or disguised continuance where two enterprises have substantially identical management, business purpose, operation, common premises, equipment, customers, supervision, and ownership. Additionally considered is whether the new corporation or business entity was formed to avoid the former entity's labor relations obligations. *Market Place, Inc.*, 304 NLRB 995, 1002 (1991); *Goldin-Feldman, Inc.*, 295 NLRB 359, 371 (1989); *Mar-Kay Cartage*, 277 NLRB 1335, 1341 (1985). None of these factors, taken alone, is the sine qua non of alter ego status. *Fugazy Continental Corp.*, 265 NLRB 1301 (1982); *Goldin-Feldman*, supra at fn. 2; *Hiysota Fuel Co.*, 280 NLRB 763 fn. 1 (1986) (absence of evidence of unlawful motivation); *Mar-Kay Cartage*, supra.[8] Also considered is the nature and

[7] *Perma Vinyl* was expressly approved by the Supreme Court in *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973).

[8] In *Alkire v. NLRB*, 716 F.2d 1014 (1983), a majority of the Fourth Circuit held that an alter ego could not be established without

extent of the negotiations and formalities surrounding the transaction; the absence of formalities and arm's length dealing between the parties tending to indicate the existence of a disguised continuance. *Fugazy Continental Corp*., supra at 1301–1302. As the Board stated in latter case, the question is ''whether the employers constitute the same business in the same market.''

RMS contends that under either the Board's tests for alter ego status or the test applied by the Fourth Circuit Court of Appeals, the General Counsel fails to meet its burden.

First, it argues, and I agree, that RMS was not created to avoid Marbro's labor relations obligations. Rather, it experienced a bona fide discontinuance. The evidence demonstrates that Marbro ''gave up the ghost'' because it was in severe financial difficulty, unable to secure essential bonding or financing. Secondarily, it appears, Rosario Marinucci had lost the desire to continue in an active business capacity with the loss of his spouse. Marbro had earlier ceased to recognize the Union and had functioned for several years without labor agreements. Its potential liability under the unfair labor practice charge then pending before the Board on exceptions from the decision of the administrative law judge does not appear to have been a material factor in its dissolution. Nonetheless, Marbro did benefit from the transition in that it avoided the judgment against it.

The remaining factors are less clear. Rosario Marinucci was the sole owner of Marbro. He is the major investor in RMS with an initial investment, not considering his loan guarantees, more than 12 times greater than that of all the other owners who had put up only nominal initial investments. Considering the extent of his investment and his potential control through the ''power of the purse,'' he is a substantial owner in RMS, notwithstanding that he holds none of the voting shares. Even if, as RMS' counsel asserts, his investment in the preferred stock was ''really a loan'' (of which there is no evidence), the unbalanced ratio of debt to equity would have given him as much control as he wished to exercise. Rosario Marinucci remained an owner of the new enterprise, although not the sole owner, as he had been in Marbro.[9]

Similarly, the evidence with respect to the continuity of management and supervision, while mixed, is weighted toward an alter ego or successorship finding. Thus, at the moment of RMS's conception, and for more than a year preceding it, John Dowd, who became RMS president, was president of Marbro. It is alleged that his instructions were to act at Rosario Marinucci's direction. However, the record contains no indication that Rosario continued to exercise day-to-day management during these personally difficult times.[10] Michael and Steven Marinucci each assumed the same corporate offices in RMS that they had held in Marbro during the same period, vice president and secretary-treasurer.

Moreover, the sons and sons-in-law of Rosario Marinucci assumed managerial positions in RMS essentially equivalent to what each had done at Marbro. Moreover, RMS' initial crews came over from Marbro with both their employee and supervisory complements intact. That Marbro's vice presidents did not come over to RMS is of little significance inasmuch as RMS was smaller than Marbro had been in its heyday and the divisions for which those vice presidents were responsible disappeared in Marbro's economic decline. With the sons and sons-in-law continuing to oversee the actual projects and with the same first level supervisors overseeing their same crews, there was clearly continuity and substantial identity in both management and supervision, as well as in the work force.

Counsel for RMS argues that RMS is engaged in a substantially different business than Marbro, one which was limited to small pipe laying jobs within the Washington metropolitan area with a limited number of employees, as distinguished from Marbro's broad-based heavy construction work spread over a wide geographical area, which employed upwards of 400 employees. If one looks at what Marbro was between 1978 and 1985, when Marbro was engaged in various forms of heavy construction, there is a wide disparity. However, Marbro was initially a sewer utility company before it undertook its fatal expansion. And, at the time when RMS came into being, Marbro was in the process of downsizing, giving up its nonutility work as its projects were completed. When RMS began its operations, it was very nearly identical to what Marbro had evolved into by that time. It was also similar to what Marbro had been before its expansion, although it was not yet financially capable of undertaking the large projects which Marbro had specialized in before experiencing its economic decline.

The differences between Marbro and RMS in regard to the nature and size of its operations and of the projects undertaken do not militate against an alter ego or successorship finding. In *Custom Mfg. Co*., 259 NLRB 614 (1981), a new business entity was found to be an alter ego notwithstanding that it was smaller than its predecessors, operated at a different location, and sold goods manufactured by others rather than made by its employees, to a commercial accounts rather than to private residences, as the predecessors had. The

proof of both continued control by the original employer and employer motivation to secure some benefit ''related to the elimination of its labor obligations.'' See also *NLRB v. McAllister Bros*., 819 F.2d 439 (4th Cir. 1987). With due respect to the Fourth Circuit, the administrative law judge is obligated to apply established Board precedent which the Supreme Court has not reversed. *Waco, Inc*., 277 NLRB 746 fn. 14 (1984). Under established Board law these factors are relevant but not essential to an alter ego conclusion.

[9] In *John Fender Electric Co*., 244 NLRB 957 (1979), relied on by RMS, the Board, in affirming the judge's conclusion that two companies were not alter egos, expressly noted, at fn. 1, that ''apart from the substantially different ownership of the two companies and other factors, [they had] markedly divergent labor relations and operational structures.'' RMS' operational structure was similar to that of Marbro's utility division before Marbro's demise; there was no evidence proffered on labor relations. In *A-1 Schmidlin Plumbing Co*., 284 NLRB 1506 (1987), similarly cited by RMS, no alter ego was found but the Board held the new entity to be the successor to the original, notwithstanding a substantial change in ownership interests.

[10] *A-1 Schmidlin Plumbing Co*., 284 NLRB 1506 (1987), is inapposite. There, the son of the owner of the alleged predecessor business, who became the co-owner of the alleged successor, was the ''titular . . . vice president'' of the former. As such, he worked, with no independent authority, under the active management of his father, who controlled the day-to-day operation and then of his stepmother, who was president and principal owner, engaged in active management, after his father's death. In contrast, Dowd appears to have run the business, following only general parameters laid down by his father-in-law who sought to be relieved of active and continuing day-to-day management.

Board pointed out that the new business was a spinoff of the former businesses, tempered by the available economic resources, and amounted essentially to an evolution of the business such as could be expected to occur in that business field and under the prevailing economic conditions. A like result is found in *Hot Bagels & Donuts*, 244 NLRB 129 (1979), where the successor, although smaller than the predecessor had once been, was similar in operation to what the predecessor had become at the time of its collapse.[11]

With respect to the question of premises and equipment, I note that RMS occupies the same facilities, both the office and the separate yard, as Marbro had and acquired the use of those premises from Marbro's owner without the formality of leases. It has also acquired trucks from that owner's other businesses, without the formality of changing the titles.[12] In addition to showing continuity, these facts further evidence Rosario Marinucci's potential for controlling the direction and activities of RMS.

When RMS began its operations, it completed jobs which Marbro had begun, under subcontract from Marbro. Thereafter, a substantial portion of its work came from the WSSC, for which Marbro had also worked.[13]

Finally, I take note that RMS, by virtue of its name, ''R. Marinucci & Sons,'' has held itself out to the public as a continuation of Marbro. It thereby gained the benefits, if any, of Rosario Marinucci's reputation in the industry.

Based on all the foregoing, I would find RMS to be the alter ego of Marbro, responsible for remedying the judgment which Marbro avoided by the transition to RMS. As discussed above, the two enterprises enjoyed substantially identical management, business purpose, operation, supervision and common premises. There was, moreover, commonality of ownership, with the sole owner of Marbro being the major investor.

However, even if the foregoing facts are deemed to fall short of meeting either the Board's or the Fourth Circuit's tests for alter ego, I am satisfied that RMS is sufficiently closely related to be deemed Marbro's successor, with knowledge of the unfair labor practices, and thus liable to remedy those unfair labor practices.

In *Hot Bagels*, supra, the Board, quoting *Miami Industrial Trucks*, 221 NLRB 1223, 1224 (1975), stated that: ''The keystone in determining successorship is whether there is substantial continuity of the employing industry.'' In this case, as discussed more fully above, and at the risk of being redundant, the evidence discloses that the same employees continued to do the same work, with some of the same equipment or with similar equipment leased under the guarantee of the prior owner, under the same management and supervision, with the same wages and benefits, for an employer who operated out of the same two locations, with common officers and, to a significant degree, common ownership, which held itself out to the public as having maintained a continuity with the former business entity. The requisite continuity is patent.

In *Robert G. Andrew, Inc*., 300 NLRB 444 (1990), the Board stated as follows:

> In *Golden State Bottling Co. v. NLRB*, supra, the Supreme Court held that an employer who acquires substantial assets of a predecessor and who continues without substantial change the predecessor's business operations, can be required to remedy the predecessor's unremedied unfair labor practices if it is on notice of the predecessor's unlawful conduct. It is now settled that, once the General Counsel establishes an employer's successorship status, the burden is on that successor to show that it lacked knowledge of its predecessor's unfair labor practices. [Citations omitted.] Furthermore, in determining whether the successor has made that showing, the Board is not bound by a successor's denials of knowledge. It may conclude that the successor had the requisite knowledge if reasonable inferences from the record as a whole support such a finding. *Golden State Bottling Co. v. NLRB*, supra, 414 U.S. at 172–174.

In the instant case, the presumption applies and is buttressed by the facts that: (1) Rosario Marinucci retained a significant interest in the successor; (2) the owners of RMS are two sons and two sons-in-law of Rosario Marinucci and are likely to have learned of the unfair labor practice charges and the judge's decision in the course of family discussions; and (3) Dowd, who was Marbro's comptroller and then its president, became president of RMS.

On brief, counsel for RMS asserted that RMS lacked knowledge of the unfair labor practices. The record, however, contains no clear denial of knowledge. Dowd only testified that he had no knowledge of union contracts or negotiations during his tenure at Marbro, beginning in 1983. Such testimony is inadequate to rebut the presumption or to shift the burden back to the General Counsel.

Even the answer, which of course is not evidence, contained no denial; it only denied that RMS had knowledge that the Board would contend that it was responsible for payment of the judgment against Marbro. Moreover, Rosario Marinucci and Steven Marinucci failed to respond to valid subpoenas. Rosario, at least, might have been able to offer testimony respecting this issue. His failure to appear warrants an inference that, if he had appeared, he would have been unable to rebut the presumption of knowledge. *Martin Luther King, Sr., Nursing Center*, 231 NLRB 15 fn. 1 (1977).

RMS further argues that the successorship doctrine should not apply because there was no acquisition of Marbro's assets by RMS and no sale of assets by Marbro to RMS. In fact, RMS, retaining Rosario's name in its title, and continuing to operate out of the same office, acquired whatever good will Marbro possessed in the industry, at no cost. Additionally, it acquired its operating capital and loan guarantees from Rosario, Marbro's sole owner. That there was no sale militates, if in either direction, in favor of finding liability.

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[11] See also *NLRB v. Ozark Hardwood Co*., 282 F.2d 1 (8th Cir. 1960), enfg. 119 NLRB 1130 (1957).

[12] Counsel for RMS, citing *Alkire v. NLRB*, supra, notes that it is common for one business to occupy ''the niche in the economic order'' previously occupied by another entity which has failed and, in doing so, to utilize the same facilities and equipment. In *Alkire*, however, there was a formal sales agreement, executed by the parties, providing for the new entity to do so; no such formality exists here.

[13] I agree with RMS that this factor is of lesser significance inasmuch as WSSC is the principal source of sewer work in the metropolitan area. Anyone doing this work would, of necessity, do it for WSSC.

RMS acquired Marbro's business, and Rosario's financial backing, with little investment of capital. They did not have to balance the potential liability against any acquisition costs. Even if it had bargained with Rosario for Marbro's assets, it could not have gotten a better deal than it did.

RMS argues that inasmuch as the liability here is to the Union's funds, not present employees, no potential for labor unrest exists such as might warrant imposition of liability. And, finally, it argues that a judgment against RMS could threaten its continued viability and possibly cost RMS' present employees their jobs. As to the former, RMS, as alter ego and successor is subject to union pressure to secure payment of the judgment. There exists a potential for labor unrest. The short answer to the final contention is that Marbro should have met its obligation when it arose. Any adverse impact on RMS now is the fault of Marbro and its officers, not the National Labor Relations Board.

C. *Extent of Liability*

The orders of the Board and the Court require that Marbro, its officers, agents, successors, and assigns pay designated amounts to the appropriate union benefit funds plus any additional amounts computed in the manner described in *Merryweather Optical Co*., 240 NLRB 1213 fn. 13 (1979). In *Merryweather* the Board noted that it did ''not provide at the adjudicatory stage . . . for the addition of interest at a fixed rate'' for unlawfully withheld fund payments because the provisions of employee benefit plans were variable and complex. Rather, it provided for such additional amounts to be added to the benefit funds as may be necessary to make the funds whole, as determined at the compliance stage depending on the circumstances of the case. The additional amounts are those which may be determined by reference to the trust documents or losses directly attributable to the unlawful withholding, including the loss of return on investment and additional administrative costs. No such additional amounts have been established here and the General Counsel seeks the liquidated amounts unlawfully withheld, plus interest. The Board has long recognized the propriety of interest, without the need for additional proof, as an appropriate element of a make-whole order. See *Isis Plumbing & Heating Co*., 138 NLRB 716 (1962). Accordingly, I shall limit RMS' liability to the amount stated in the backpay specification, $57,664.04, plus interest as computed in accordance with *Florida Steel Corp*., 231 NLRB 651 (1977).

Counsel for the General Counsel also seeks to extend RMS' liability, pursuant to the language of the original Board Order, ''until the Respondent negotiates in good faith with the Union to an agreement or to a good faith impasse or until the Union refuses to bargain.'' However, that same Board Order noted, in footnote 3, that no exceptions were taken to the judge's conclusion that Respondent did not unlawfully withdraw recognition from the Union in violation of Section 8(a)(5). As recognition was lawfully withdrawn, there was no continuing obligation to bargain. Accordingly, I can find no basis for such an extension of liability.

CONCLUSIONS OF LAW

1. R. Marinucci & Sons, Inc. is the alter ego of, and successor to, Marbro Company.

2. R. Marinucci & Sons, Inc. and Marbro Company, their officers, agents, successors, and assigns, are jointly and severally liable to remedy the unfair labor practices committed by Marbro Company.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

The Respondents, Marbro Company and its alter ego and successor R. Marinucci & Sons, Inc., Beltsville, Maryland, their officers, agents, successors, and assigns, shall, jointly and severally, pay to the appropriate union benefit funds the sums set forth in the Order of the National Labor Relations Board at 297 NLRB No. 69, slip op. at 4 (Dec. 22, 1989), as enforced by the Fourth Circuit Court of Appeals on November 29, 1990, on behalf of the employees named in the Board and court orders, plus interest.

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.